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No. 91-74

In The

Supreme Court of the United States

October Term, 1991

BERNEDA R. O'SHEA,

Petitioner,

v.

COMMERCIAL CREDIT CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

JEFFREY PEABODY AYRES
(Counsel of Record)

BRENDA J. TRANCHIDA
VENABLE, BAETJER AND HOWARD
1500 Mercantile Bank
and Trust Bldg.
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 244-7400

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Berneda R. O'Shea signed an age discrimination release when she was workforce reduced in August 1987. Up until that time, she had been a computer programmer/analyst at Commercial Credit Corporation.[1] The

[1] Commercial Credit Corporation is a wholly owned subsidiary of Commercial Credit Company, which is owned by Commercial Credit Holdings, Inc., which is a wholly owned subsidiary of Primerica Corporation. Primerica is a publicly traded company. *See* Supreme Court Rule 29.1.

release specifically covered age discrimination claims. O'Shea signed it (after consulting with two lawyers) in exchange for a substantial termination package from the Company. This package included: $23,371.20 in severance pay; 4 weeks of normal base pay; and enhanced pension and insurance benefits that she continues to receive – all of which constituted consideration to which O'Shea was not otherwise entitled.

Ms. O'Shea asked that the severance pay be deferred by five months until January 1988, and Commercial Credit agreed to this request. Once she had received the deferred payments, though, O'Shea brought an age discrimination action against the Company. As she admits in a letter to U.S. Senator Barbara Mikulski, O'Shea " 'purposely avoided [filing an] age discrimination action' against the appellee until the deferred severance benefits were paid to her." *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 361 (4th Cir. 1991) (Appendix A to Petition at pp. 5a-6a).[2]

O'Shea signed her release three years before Congress enacted the Older Workers Benefit Protection Act, Pub. L. 101-433, § 201, 104 Stat. 983, 29 U.S.C. § 626(f) ("OWBPA").[3] The OWBPA, which sets forth specific

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[2] The facts in the text of this Brief in Opposition are described by the Fourth Circuit in its opinion below, 930 F.2d at 359-361, Appendix A to Petition for Writ of Certiorari ("Petition") at pp. 2a-6a, and by the trial court in its decision below, 734 F. Supp. at 219-220, Appendix B to Petition at pp. 14a-15a. *See also*, 930 F.2d at 362 n.3, Appendix A to Petition at p. 9a n.3.

[3] The OWBPA is reprinted in Appendix C to the Petition.

threshold requirements that must be satisfied before an age discrimination release will be deemed valid, did not apply to the release signed by O'Shea.[4]

Because of the release that she signed, the trial court entered summary judgment against Ms. O'Shea on her age discrimination claims. The court held that – regardless of whether state or federal law governed the issue – the release barred O'Shea's suit. *O'Shea v. Commercial Credit Corp.*, 734 F. Supp. 218, 221 (D. Md. 1990) (Appendix B to Petition at pp. 17a-18a). *See also, O'Shea, supra,* 930 F.2d at 362 n.2 (Appendix A to Petition at p. 8a n.2). Moreover, the undisputed facts showed that O'Shea "ratified the release, thereby removing any impediment that might theretofore have existed, by accepting and retaining benefits under it." *O'Shea, supra,* 734 F. Supp. at 220, (Appendix B to Petition at p. 16a).

On appeal, the Fourth Circuit affirmed the trial court's decision in all respects:

> "O'Shea validly released her ADEA rights under both federal and state law and, moreover, she subsequently ratified the agreement by accepting both the severance pay and the other continuing benefits of the termination package."

O'Shea, supra, 930 F.2d at 363 (Appendix A to Petition at p. 11a).

The Fourth Circuit decided that "ordinary contract principles" should apply to this pre-OWBPA release –

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[4] *See* S. Bill 1511, Section 202(a) ("The amendment made by Section 201 shall not apply with respect to waivers that occur before the date of enactment of this Act"). OWBPA, Pub. L. 101-433, § 202(a), 104 Stat. 984. The text of this section is set forth in Appendix A to Respondent's Brief in Opposition.

rejecting a federal "totality of the circumstances" approach adopted by several courts of appeals. *O'Shea, supra,* 930 F.2d at 362 (Appendix A to Petition at p. 8a). Nevertheless, the Fourth Circuit agreed with the trial court that, under *both* federal and state law, O'Shea lost on *both* the release and ratification issues.[5] O'Shea's Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

Ms. O'Shea's Petition identifies two Questions Presented. She argues that this Court should grant the Writ to decide: (1) whether "ordinary contract principles" or a federal "totality of the circumstances" test should apply to the release of age discrimination claims; and (2) whether the lower courts' ratification rulings are contrary to the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 601 *et seq.* ("ADEA") and the OWBPA. Wholly apart from the correctness of the lower courts' rulings, though, the Writ should be denied for two reasons.

First, the Writ should be denied because it does not raise significant issues. Most importantly in this respect, the OWBPA significantly reduces the future impact of the lower courts' rulings. O'Shea signed her release three years before the OWBPA, which governs all ADEA releases signed after October 16, 1990. The OWBPA does not apply to releases (like O'Shea's) occurring before that

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[5] *See* Fourth Circuit's decision quoted in the text, 930 F.2d at 363 (Appendix A to Petition at p. 11a.).

date. *See* p. 3 n.4, *supra*. For releases occurring after that date, a federal statute – and neither "ordinary contract principles" nor a federal "totality of the circumstances" test – sets forth the specific threshold criteria that an ADEA release now must meet to be valid.

Now, a federal statute provides that an ADEA release must be written in understandable language. It must specifically refer to age discrimination rights or claims, and cannot waive anything that arises after the release is signed. The release must also be supported by consideration, and the employee must be advised to consult with an attorney beforehand. The employee must be given at least 21 days to consider the release, which must also be revocable for 7 days after execution. When a group or class of employees is offered an exit or other employment termination program in connection with the release, employees must be given 45 days to consider signing – as well as detailed information to assess the program. *See* OWBPA, 29 U.S.C. § 626(f)(1) (Appendix C to Petition at pp. 20a-22a).

In view of the detailed threshold criteria specified by the OWBPA, the impact of all pre-OWBPA decisions – including the rulings below – has decreased substantially. Correspondingly, the Court has far more significant issues to which it can devote its attention than the questions identified in O'Shea's Petition.

Second, the Writ should be denied because of the multiple grounds upon which the lower courts based their decisions. These multiple grounds underscore that Ms. O'Shea's case is not an appropriate vehicle to decide

the Questions Presented, even if those Questions were significant enough to warrant review.

Ms. O'Shea lost under *both* federal and state law on *both* the release and ratification issues. Consequently, even if she convinces the Court that the federal "totality of the circumstances" test should be applied to pre-OWBPA age discrimination releases, she would lose because – as the lower courts ruled – the Commercial Credit release was valid under state or federal law. Moreover, even if she convinces this Court that the ratification ruling is inconsistent with the ADEA and the OWBPA, O'Shea would lose because of the lower court rulings on the enforceability of the releases themselves.

In summary, then, the Writ should be denied. Wholly apart from the fact that the trial court and the Fourth Circuit properly upheld the validity of this release, the Questions Presented are simply not that important to anyone but Commercial Credit and Ms. O'Shea. Moreover, even if they were, Ms. O'Shea's case is simply not an appropriate vehicle for deciding the Questions Presented.

CONCLUSION

For the reasons stated, Commercial Credit urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

JEFFREY PEABODY AYRES
(Counsel of Record)

BRENDA J. TRANCHIDA
VENABLE, BAETJER AND HOWARD
1500 Mercantile Bank
and Trust Bldg.
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 244-7400

Attorneys for Respondent

APPENDIX A

101 P.L. 433, Title II, § 202, 104 Stat. 984

SEC. 202. EFFECTIVE DATE.

(a) IN GENERAL. – The amendment made by section 201 shall not apply with respect to waivers that occur before the date of enactment of this Act.

(b) RULE ON WAIVERS. – Effective on the date of enactment of this Act, the rule on waivers issued by the Equal Employment Opportunity Commission and contained in section 1627.16(c) of title 29, Code of Federal Regulations, shall have no force and effect.